

NOT FOR PUBLICATION – for upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

TERRI POLAK, MARIE REGIS, HECTOR
RIOS, CATHERINE ALEXANDER, JEAN
ALTAGRACIA ALANO, GLORIA TAYLOR,
ROLAND JOHN, ARNOLD LEWIS, ENRIQUE
PEREZ, IRIS MARTINEZ, and EMMANUELA
CHARLES,

Civ. No. 2001-01

Plaintiffs,

v.

ANDREW RUTNIK, Commissioner of
Licensing and Consumer Affairs; IRA
HOBSON, Commissioner of Housing,
Parks, and Recreation; FRANZ
CHRISTIAN, Commissioner Police
Department; CHARLES TURNBULL,
Governor of the Virgin Islands, and
THE UNITED STATES OF AMERICA

Defendants,

and

THE UNITED STATES TRUST COMPANY,
SONIA KIM and CHRISTINE S. WHEATON,
as Co-Trustees of the HOMER D.
WHEATON QUALIFIED DOMESTIC TRUST

Intervenor-Defendants.

APPEARANCES :

Kenth Rogers, Esq.

St. Thomas, U.S.V.I.

For the plaintiffs,

Denise George-Counts, Esq.

Kerry Drue, Esq.

Asst. Attorneys General

Department of Justice

St. Thomas, U.S.V.I.

For the defendants Andrew Rutnik, Ira Hobson, Franz

Christian, and Charles Turnbull,

James S. Carroll, III

First Asst. U.S. Attorney
St. Thomas, U.S.V.I.

For the United States,

Chad Messier, Esq.

St. Thomas, U.S.V.I.

For the intervenor-defendants.

MEMORANDUM

Moore, J.

On Friday, April 20, 2001, the Court held a hearing on the pending motions to dismiss. At the hearing, the Court signed an order granting the United States' unopposed motion to dismiss. Left unresolved was the unopposed motion to dismiss filed by the United States Trust Company, Sonia Kim and Christine S. Wheaton, as co-trustees of the Homer D. Wheaton Qualified Domestic Trust ["Trustees"]. Also pending is the unopposed motion for partial summary judgment filed by the defendant officials of the Government of the Virgin Islands ["defendants"]. This memorandum addresses these two motions.

By way of brief background, the plaintiffs are itinerant vendors who for many years conducted their vending businesses at the scenic overlook across from Drake's Seat. In June of last year, the Department of Housing, Parks, and Recreation ["Housing"] terminated agreements with the vendors purporting to

allow the vendors to set up at the Drake's seat site. After Mr. Ira Hobson, Commissioner of Housing, announced that Housing would cease allowing the vendors to set up at the site, Mr. Andrew Rutnik, Commissioner of the Department of Licensing and Consumer Affairs, gave the vendors thirty days to vacate the site. After several extensions of time, the plaintiffs were ultimately removed from the site on December 1, 2000. These and other proceedings ensued.

In this action, the plaintiffs allege that the defendants conspired to deprive them, in violation of 42 U.S.C. § 1985(c), of their constitutional rights to due process and equal protection under the Fourteenth Amendment, and "to assemble for commercial purposes" under the First Amendment. In addition to a claim for damages, the plaintiffs ask the Court to enjoin the defendants from preventing the vendors from conducting their business at the Drake's Seat site. The Trustees, who claim exclusive ownership of the land in question, were allowed to intervene in this action in order to protect their interests. In addition to their 12(b)(6) motion, the Trustees served a counterclaim against the vendors on January 10, 2000, in which they seek declaratory relief as well as damages for trespass and unjust enrichment, and a cross-claim against the defendants in which they seek an adjudication regarding the scope and alleged

termination of an easement granted in 1948 to the Government's predecessor. When the vendors did not timely answer the counterclaim, the Clerk entered default on April 16, 2001 pursuant to FED. R. CIV. P. 55(a). The next day, the Trustees served an amended answer, adding the Government of the Virgin Islands ["government"] to its cross-claim and seeking an additional adjudication regarding very recent legislation that purports to authorize the vendors to return to the site. (See First Amended Intervenor's Answer, Counterclaim, and Cross-Claim, Docket No. 62, at 12 (setting forth the text of "Governor Bill No. 23-0310").)

In their motion for partial summary judgment, the defendants assert that because the vendors have no legitimate property interest which would afford them the protection of the Due Process Clause, the defendants are entitled to judgment as a matter of law on those aspects of the complaint based on an alleged due process violation. The Trustees seek dismissal of the entire action, arguing that the plaintiffs have failed to state any claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). The Trustees further argue that the plaintiffs are collaterally estopped from relitigating the issue whether they were denied due process when their right to vend at Drake's Seat was revoked.

On April 12, 2001, this Court entered a final judgment in a closely related case brought pursuant to 42 U.S.C. § 1983 and the Due Process Clause. See *Rios v. Lebron*, Civ. No. 1985-280, slip op. (D.V.I. St. Thomas-St. John Div. Apr. 12, 2001). That judgment dissolved a 1985 preliminary injunction barring the Department of Conservation and Cultural Affairs from preventing vendors holding valid placement permits from conducting their vending business at the Drake's Seat site. *Id.* at 12. The Court held that, "[b]ecause the vendors no longer hold valid placement permits from Public Safety, they no longer have [constitutionally protected] property interests." *Id.* ("The government was bound by neither the preliminary injunction nor the Constitution to afford notice and a hearing before removing the vendors from Drake's Seat.").

One of the section 1985 claims brought by the plaintiffs in this case is based squarely on the allegation that their right to vend at the Drake's Seat site was revoked without due process of law. This is the very issue litigated in *Rios v. Lebron* and decided in favor of the defendants in that case. Moreover, the parties on both sides in this action are either the same as those in *Rios v. Lebron* or so closely related to be bound by that decision. Thus, the Court agrees with the Trustees that the plaintiffs are estopped from relitigating this issue. See

Parklane Hosiery v. Shore, 439 U.S. 322, 327 n.5 (1979) ("Under the doctrine of collateral estoppel . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. "); *St. Croix Hotel Corp. v. Government of the Virgin Islands*, 867 F.2d 169, 173 (3d Cir. 1989) ("The doctrine of issue preclusion, applicable in the Virgin Islands, bars a party in these circumstances from prevailing on a point previously litigated and resolved against him." (citing *Gregory v. Chehi*, 843 F.2d 111, 115-16 (3d Cir. 1988))); see also RESTATEMENT (SECOND) JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, . . . the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Because the Court has already decided that the vendors did not possess a legitimate property interest at the time their right to vend at Drake's Seat was terminated, and thus had no right to due process, the plaintiffs' claim that the defendants in this case conspired to deprive them of that right cannot survive.

With respect to the Trustees' assertions that the plaintiffs fail to state any other claim with respect to alleged violations of their rights under the First or Fourteenth Amendments, the

Court finds that a ruling on these questions would be premature at this early stage of the case. A significant part of the Trustees' argument rests in their claim that the parking lot across from Drake's Seat is private property, which they own and upon which the vendors have no right to conduct business, with or without valid permits. Although the vendors have defaulted on the Trustees' counterclaim, thereby waiving their right to contest the ownership of the land in question, the scope of the easement, or the effect of pertinent zoning laws, the Court has not been asked to enter judgment on the default. The Court will grant the defendants' motion for partial summary judgment and will grant the Trustees' motion to dismiss to the extent that it raises the same due process issue. The Court will deny, however, the balance of the Trustees' motion.

The Court also determined at the April 20th hearing that plaintiffs' counsel had no business license to practice law in the Virgin Islands, as evidenced by the March 13th order of the Department of Licensing and Consumer Affairs. *See Government of the Virgin Islands v. Kenth Rogers, P.C.*, Case No. L-8/1999, order at 3 (Dept. of Licensing and Consumer Affairs, St. Thomas-St. John Div. Mar. 13, 2001) (Louis Penn, Hearing Officer). In the interests of justice, the Court will allow the plaintiffs two weeks from the date of the accompanying order to retain new

counsel, if they have not already done so.¹ Once counsel is obtained, this case will otherwise be set for expedited discovery and trial.

ENTERED this 24th day of April, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

¹ As indicated at the hearing, if Attorney Rogers can demonstrate that his license has been reinstated by the Department of Licensing, or that the effect of the revocation has been otherwise suspended, he may of course continue to represent the plaintiffs.